



**Mwilu v Mutei (Environment & Land Case 2 of 2016)  
[2024] KEELC 5490 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 2 OF 2016**

**A NYUKURI, J  
JULY 24, 2024**

**BETWEEN**

**KASALU NZIOKA MWILU ..... PLAINTIFF**

**AND**

**JOYCE NDUNGE MUTEI ..... DEFENDANT**

**RULING**

1. Before this court is an application dated 24<sup>th</sup> February 2023 and filed on 27<sup>th</sup> February 2023, by the defendant seeking the following orders;
  - a. Spent
  - b. That the honourable court do issue an order of inhibition stopping further dealings, registration and transactions over those parcels of land known as Mavoko Town Block 3/92162, Mavoko Town Block 3/92163, Mavoko Town Block 3/92164 and Mavoko Town Block 3/92165.
  - c. That registration of parcel numbers Mavoko Town Block 3/92162-92165 be cancelled by the Land Registrar Machakos and the land register rectified so the said land parcel do revert to their mother title number Mavoko Town Block 3/2592 or Mavoko Town Block 3/49573 to Mavoko Town Block 3/49576 and which should be registered in the name of the defendant/ applicant herein.
  - d. That the honourable court be pleased to issue any further orders made in the interest of justice.
  - e. That costs be awarded to the defendant.
2. The application is based on grounds on the face of it and supported by the affidavit dated 24<sup>th</sup> February 2023 and sworn by Joyce Ndunge Mutei, the defendant in this suit. She deposed that she was the initial registered owner of the suit property known as Mavoko Town Block 3/2592 which she later subdivided



into Mavoko Town Block 3/49573 -49576 prior to the filing of this suit. Further, that during the pendency of this suit, the court made a ruling for the collapse of the subdivisions and ordered that the same do revert to the original title, being Mavoko Town Block 3/2592.

3. She also averred that judgment was entered in her favour in this matter wherefor the plaintiff's suit was dismissed, and the defendant's title affirmed as being properly owned by the defendant. She deposed further that upon issuance of the said judgment, she conducted a search and found that the respondent had fraudulently subdivided the land into title numbers Mavoko Town Block 3/92162-92165, all in the respondent's name. It was her averment that the respondent had done this in full knowledge of the pendency of the suit, only a few days to the judgment so as to defeat the court's verdict in case the applicant was successful. She prayed that the court does grant the orders sought, on a purposive broad constitutional interpretation as captured under articles 10 and 259 of the Constitution. She attached official search of the suit property, judgment herein, an earlier order of this court, and certificates of official searches for Mavoko Town Block 3/92162-92165.
4. The application is opposed. The respondent filed a preliminary objection dated 13<sup>th</sup> March 2023. She contended that the orders sought were substantive orders that require filing of a substantive suit, and that the application is inviting the court to wade into a new controversy between the parties which require a fresh suit.
5. In addition, the respondent filed a replying affidavit dated 10<sup>th</sup> May 2023 and sworn by Kasalu Nzioka Mwilu. The deponent pointed out that the application was not for review under section 80 of the Civil Procedure Act, but rather an application for an injunction under and for a substantive claim of cancellation of titles. He maintained that the judgment herein having been entered on 5<sup>th</sup> February 2023, the matter is concluded and determined, and that therefore the court is now *functus officio* and does not have jurisdiction to consider or grant prayers 2 and 3 of the application.
6. It was the deponent's argument that any party who was dissatisfied ought to have appealed, and that four other applications had been made seeking the same prayers but that they were dismissed or withdrawn. He further averred that the court cannot now go back and forth and repeat orders issued back in 2017 or 2018 on a matter which was substantially discharged. He concluded by stating that the applicant could only file a fresh suit since the judgement had no positive order to implement and that the defence did not include a counterclaim. She attached the court's ruling, some applications and the defence.
7. In a rejoinder, the applicant filed a supplementary affidavit dated 3<sup>rd</sup> July 2023 to buttress her case. She reiterated that the replying affidavit by the respondent was a clear admission that he had changed ownership of the suit properties before the court could make a determination which shows impunity and contempt on her part. She further deposed that the respondent had defied the court's orders issued pursuant to her application dated 17<sup>th</sup> January 2023 wherein the court granted orders of status quo but the plaintiff went ahead to subdivide the suit property and that this court is clothed with jurisdiction to right a wrong.
8. On 28<sup>th</sup> March 2023, the court ordered that both the application and the preliminary objection be heard together and the parties were directed to file their submissions thereto. On record are the applicant's submissions dated 3<sup>rd</sup> July 2023 and filed on even date, as well as the respondent's submissions dated 16<sup>th</sup> January 2024 and filed on even date. The court has considered both sets of submissions.



## Analysis and determination

9. The court has considered the matter at hand and in determining both the application and the preliminary objection, the following are the issues that ensue;
  - a. Whether the court is *functus officio* with regard to the application dated 24<sup>th</sup> February 2023.
  - b. Whether the applicant is entitled to the orders sought
10. The [Black's Law Dictionary 11<sup>th</sup> Edition](#) defines *functus officio* as follows;

“Latin “having performed his or her office.” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.
11. Therefore, once a court has determined a dispute, it is deemed to have discharged its mandate in so far as the issues involved are concerned, giving finality to its decision, and has no mandate to determine the same disputes afresh. In the case of [Telkom Kenya Limited v John Ochanda \(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited\)](#) [2014] eKLR, the court had the following to say about the *functus officio* doctrine;

*functus officio* is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon.
12. The Supreme Court of Kenya in the case of [Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others](#) [2013] eKLR, cited with approval the excerpts from an Article by [Daniel Malan Pretorius entitled “The Origins of The functus officio Doctrine with Special Reference to its Application in Administrative Law” \(2005\) 122 SALJ 832](#) which states;

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers, may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.
13. In this case, there is a judgment dismissing the plaintiff’s claim over the suit property on account of her failure to present sufficient evidence to impeach the defendant’s title. The import of the judgment being that the court did not award the suit property to the plaintiff. However, while the matter was pending, the plaintiff got herself registered as owner of the suit property on the basis of an interlocutory order. The issue therefore, is whether in seeking cancellation of registration in the plaintiff’s name of the parcels of land known as Mavoko Town Block 3/92162-92165, which occurred during the pendency of the suit, the defendant is seeking for a second determination of the matter dealt with in the judgment.
14. Having considered the judgment it is clear that the plaintiff’s prayer that she is entitled to the suit property which was registered in the defendant’s name was dismissed, upon the court finding that she had not pleaded or provided evidence that would impeach the defendant’s title.
15. The defendant’s prayer in the instant application is that while the suit was pending, the plaintiff proceeded to fraudulently subdivide the suit property and register it in her name. It is not in dispute that before the suit herein was filed, parcel No. Mavoko Town Block 3/2592, which was the subject of the suit herein, was registered in the name of the Defendant and the subdivisions thereof which



occurred before the suit was filed, were still registered in the defendant's name. The record shows that pursuant to the plaintiff's application dated 15<sup>th</sup> August 2017, the court ordered that all subdivisions from parcel Mavoko Town Block 3/2595 be collapsed and Revert to Mavoko Town Block 3/2592 originally registered in the name of the plaintiff. It is upon this order that the plaintiff got herself registered as proprietor of the subdivisions of the suit property. It is clear that the plaintiff took advantage of the typographical factual error of the order made on 10<sup>th</sup> October 2017 because at no time had the defendant ever been the registered proprietor of the suit property and therefore, the reversion of the title could only be in the name of the defendant who was originally registered.

16. As at now, there is a judgment to the effect that the plaintiff has no proprietary right in the suit property. The defendant seeks the correction of the situation herein. Having considered what the court decided in the judgment and what is now sought by the plaintiff, it is clear in my mind that the prayer sought is not a matter that the court has already pronounced itself on, but a matter seeking to rectify an injustice, to align what is reflected on the title with the judgment. For those reasons, I find and hold that this court is not *functus officio*.
17. I have considered the searches for parcel Nos. Mavoko Town Block 3/92162- 92165 which are the subdivisions of the suit property and it is clear that the above titles are now registered in the name of Kasalu Nzioka Mwili, the plaintiff herein. This is contrary to the import of the judgment delivered herein. In her response, apart from stating that the defendant should file a fresh suit, the plaintiff did not deny any of the depositions made by the defendant to the effect that the registration of the suit property in the plaintiff's name was fraudulently done during the pendency of this suit.
18. Article 48 of the Constitution provides for every person's right to access to justice. It is the function of this court to ensure it facilitates access to justice, so that all the parties in this suit enjoy or bear the liability, as the case may be, of the import of the court's decision. The defendant having successfully defended this suit and obtained a judgment dismissing the plaintiff's suit on the basis that the plaintiff has no claim over her title, ought to enjoy the full import of the judgment. However as of now, the plaintiff is the registered proprietor of the suit property, which registration was obtained during the pendency of this suit, yet her claim was dismissed as per the judgment. Should this court look upon this state of affairs helplessly and require the defendant to file a fresh suit, when there is an injustice in the matter occasioned by undenied fraud on the part of the plaintiff? I do not think so. It would be unjust and unconscionable for the plaintiff who did not own the suit property, having sought the same in this court unsuccessfully, only to end up with the suit property in her name, on the basis of an interlocutory order made in the course of the proceedings of the court, when her claim was dismissed in the judgment.
19. Section 63 of the Civil Procedure Act empowers this court to make orders in the interests of justice and Article 159 of the constitution of Kenya enjoins this court to facilitate substantive justice. In the premises, the ends of justice demand that the erroneous, and fraudulent registration of the suit property in the name of the plaintiff be cancelled to give effect to the import of the judgment. When the plaintiff filed this suit, parcel number Mavoko Town Block 3/2592 had already been subdivided into Mavoko Town Block 3/49573 to Mavoko Town Block 3/49576. It is only fair and in the interests of justice that the status quo obtaining as at the date of filing suit be restored.
20. In the premises, I find and hold that the application dated 24<sup>th</sup> February 2023 is merited and the same is allowed as follows;
  - a. That the registration of parcel numbers Mavoko Town Block 3/92162-92165 is hereby cancelled, and the said cancellation be effected by the Land Registrar Machakos and the land register accordingly rectified so the said land parcels do revert to their mother title numbers



Mavoko Town Block 3/49573 to Mavoko Town Block 3/49576 which, upon reversion, should be registered in the name of Joyce Ndunge Mutei, the defendant herein.

b. The costs of the application shall be borne by the respondent.

21. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Musyimi holding brief for Mr. Mutinda for applicant

Mr. Tamata for respondent

Court assistant – Josephine

